

LAW OFFICES

KILPATRICK & CODY

SUITE 800
2501 M STREET, N.W.
WASHINGTON, D.C. 20037

TELEPHONE (202) 463-2500
TELEPHONE COPIER (202) 833-8014
TWX 710-622-0781

WRITER'S DIRECT DIAL NUMBER

(202) 463-2535

December 15, 1989

OTHER OFFICES

SUITE 3100
100 PEACHTREE STREET
ATLANTA, GEORGIA 30303

SUITE 1780
100 GALLERIA PARKWAY, N.W.
ATLANTA, GEORGIA 30338

65 FALL HALL
LONDON SW1Y 5ES, ENGLAND

Mr. Spencer Duffy
Wood Preservative Review Manager
Special Review & Registration Division
Office of Pesticide Programs
Room 1006H
Environmental Protection Agency
Crystal Mall #2
1921 Jefferson Davis Highway
Arlington, Virginia 22202

Re: Modification of Consumer Information Sheet
Language with Respect to the Use of WOLMANIZED
Wood in the Construction of Water Troughs and
Silage and Feed Bunkers for Food-Producing Animals

Dear Mr. Duffy:

I was surprised to learn in our telephone conversation Wednesday that your office is treating Hickson Corporation's July 10, 1989 request for the Agency's consent to modification of certain Consumer Information Sheet ("CIS") language with respect to the use of WOLMANIZED wood as requiring de novo scientific review of the data included with the request. I am not certain under what standard the data are being reviewed, but Hickson believes such review is both unnecessary and inconsistent with the Agency's position as set forth in Wood Preservative Pesticides: Creosote, Pentachlorophenol, Inorganic Arsenicals, Position Document 4 (July 1984).

Attached hereto for your convenient reference is the Agency's stated position as it appears on pp. 117-118 of Position Document 4. I call your attention in particular to the division of responsibility between the Agency and the Food and Drug Administration (FDA) in the second paragraph, and to the last sentence of the third paragraph of the Agency response which states as follows: "If registrants wish to provide for use of treated wood in contact with food and feed, FDA must be petitioned to obtain approval for that use." The Wolman Division of Hickson petitioned FDA and obtained approval for use of WOLMANIZED wood in silage and feed troughs.

KILPATRICK & CODY

Mr. Spencer Duffy
December 15, 1989
Page 2

for food-producing animals in accordance with this language. Position Document 4 makes clear that only the FDA's approval is required for that use.

I would also call your attention to the last sentence on page 117 and the following sentence at the top of page 118, which state the Agency's position that, unlike pentachlorophenol-treated and creosote-treated wood, arsenic-treated wood is allowed for uses where it may come into contact with drinking water for animals, such as in the construction of water troughs. This position is reflected in the CIS for arsenic-treated wood, which mentions structures or containers for storing silage or food but not water.

The Wolman Division has done all that is required under Position Document 4 to obtain approval for the uses described in my July 10, 1989 letter. Because the CIS for WOLMANIZED wood is inconsistent with and does not reflect all of the properly approved uses of WOLMANIZED wood, Hickson has requested the Agency's consent to conform its CIS to the reality of the approved uses. We believe this consent can be granted by the Agency to all individual registrants who successfully petition FDA for approval as the Wolman Division has done, without any independent data review by the Agency and without seeking the consent of other signatories to the Settlement Agreement referenced in my July 10, 1989 letter. To do otherwise would be to contravene the intent and clear language of Position Document 4 and to ignore the business realities of forcing Hickson to seek the consent of its competitors in modifying its CIS to reflect the success of its individual effort in obtaining FDA approval.

Hickson did not intend to burden your review staff with an unnecessary review and evaluation of its FDA data. The data accompanying my July 10 letter were for information purposes only, to provide you with a more complete record of the FDA approval. Its submission was not intended and should not be read to invite de novo review of the data, and you may take this letter as Hickson's formal disavowal of any request for such a review.

If the Agency is unwilling to consent to Hickson's CIS modification request individually on the basis of FDA's approval in accordance with Position Document 4, we would appreciate an explanation of the reasons for that decision. Should the Agency decide, after review of Position Document 4 and the FDA approval documentation attached as Appendix B to my July 10, 1989 letter, to deny Hickson's request, we also request the return of the confidential attachments submitted as Appendix C to that letter.

KILPATRICK & CODY

Mr. Spencer Duffy
December 15, 1989
Page 3

We would be pleased to discuss this request with you and your colleagues, as appropriate, in person or by telephone. Thank you for your assistance and cooperation.

Sincerely yours,



Frederick H. von Unwerth
Attorney for
Hickson Corporation

FHV/ags
cc: Cara Jablon, Esq.

Agency Response:

The intent of the Agency's proposed restriction concerning treated wood and domestic animals is to prohibit domestic animals from continued treated wood exposure. The principal problem regarding animal contact with treated wood is potential chemical residues in food products of animal origin rather than toxicity in animals. For example, the relatively short life span of a food animal does not preclude measurable amounts of pentachlorophenol in milk and meat (Firestone et al., 1979).

According to the 1971 Environmental Protection Agency/Food and Drug Administration memorandum of understanding regarding matters of mutual responsibility under the Federal Food, Drug, and Cosmetic Act (FFDCA) and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the EPA has the responsibility for food additive regulations for pesticides that are added to food contact materials to protect the food from pests. All other petitions for the use of pesticides in food contact materials are assigned to FDA. Wood preservatives, therefore, are subject to regulation by FDA if the wood is used as a food contact material. Specifically, preserved wood cannot be used where the preservative may become a component of food or feed unless such use has been shown to be safe and a food additive regulation promulgated under section 409 of the FFDCA (Hile, 1983). However, registration and labeling of the preservatives themselves which may be required by FIFRA are under EPA's jurisdiction (Hile, 1983).

FDA has issued a regulation (21 CFR 178.3800) for the use of pentachlorophenol and sodium pentachlorophenate at levels up to 50 parts per million in wood contacting raw agricultural products. Creosote and inorganic arsenicals are not currently authorized for uses where they come in contact with raw agricultural products (Hile, 1983). FDA has also not issued any regulations for wood preservatives in treated wood which may come in contact with food or feed. Therefore, the Agency is requiring that the consumer information sheet (CIS) contain a statement prohibiting treated wood coming in contact with food and feed. If registrants wish to provide for use of treated wood in contact with food and feed, FDA must be petitioned to obtain approval for that use.

EPA has established human drinking water restrictions and has recommended discontinuation of use of coal tar-based and associated materials, which may result in drinking water contact (Cotruvo, 1983). Accordingly, the Agency will require either through the CIS or, if that proves to be ineffective, under TSCA that creosote-treated wood should not be used where it will come in contact with drinking water. Based on health-related criteria established by the National Academy of Sciences (NAS) Committee on Waste Treatment Chemicals (1983), the EPA will also require through the CIS or under TSCA that neither pentachlorophenol-treated or arsenic-treated wood be used where it may come into contact with public drinking water (Cotruvo, 1983). Use of treated wood for docks and bridges where there may only be incidental contact with drinking water will not be prohibited. Lastly, the EPA will also require through the CIS that pentachlorophenol-treated and creosote-treated wood not be used where it may come into contact with drinking water for

domestic animals. Arsenic-treated wood will be allowed for such uses, however, because the arsenic levels in water which is in contact with treated wood are below 200 ppb, a level stated to be acceptable (U.S. EPA, March 1973).

Comment Issue #8: The prohibition of applying creosote, pentachlorophenol and inorganic arsenicals to wood intended for indoor use

Several commenters contend that the benefits of indoor use of treated wood justify continued use and proposed alternative means of reducing exposure. The American Institute of Timber Construction (10) and Structural Wood Systems (14) request that interior use of pentachlorophenol-treated and inorganic arsenical-treated wood be permitted for glued laminated timber structural members because current technology does not provide other preservatives that are protective, glueable and accept finish. The AWPI (36B) and the NFPA (36B) support interior use of wood preservatives by stating that pentachlorophenol is essential for pre-treatment of wood in laminated beams because it is the only pesticide for wood pressure treatment that allows proper glue bond strength.

Levin (60) commented that occupants of California State buildings with pressure-treated glued laminated structural beams have been exposed to pentachlorophenol levels which may have caused physiological irritation. Levin (60) stated that sealing this wood with two coats of polyurethane would reduce exposure substantially. The AWPI (78) has recommended ventilation or sealers as a solution to pentachlorophenol exposure due to interior use of treated wood.

Roberts Consolidated Industries (20) also requests that interior use of 5% pentachlorophenol-based water repellent wood preservative, which binds to wood cells and does not migrate, be allowed with subsequent sealer usage. The Jenson-Wright Corporation (37), which manufactures and seals creosote-treated and pentachlorophenol-treated wood block flooring with coal tar pitch and urethane, states that the Agency has not presented data which make this proposed regulation necessary.

The Missouri Department of Agriculture (28) and the Forest Products Association of Missouri (39) contend that the proposed treatment of the bottom six inches of stall skirtboards, which measure four to five feet high, is unreasonable and impractical; this area would soon be covered with dirt.

The AWPI (36B) and the NFPA (36B) state that the prohibition of applying pentachlorophenol to wood intended for indoor use would severely restrict pentachlorophenol use in farm, storage and public buildings where the low volume of pentachlorophenol-treated wood, sealant usage and lack of prolonged occupancy of public buildings precludes health risks. These commenters suggest that the Agency prohibit interior use over large surface areas, except for cases in which sealants are used; support structures, subject to decay, should also be excluded (AWPI, 36B and NFPA, 36B).

The AWPI (36C) believes that the prohibition of inorganic arsenic-treated wood intended for indoor use should apply to brush-on inorganic arsenicals, excluding this usage for machined, pressure treated wood.